

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI  
OXFORD DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

VS.

NO. 3:21CR107

GILBERT McTHUNEL, II

DEFENDANT

SENTENCING HEARING

BEFORE HONORABLE SHARION AYCOCK  
UNITED STATES DISTRICT JUDGE

Oxford, Mississippi  
June 13, 2023

APPEARANCES:

For the Government: ROBERT J. MIMS, Esquire  
U.S. Attorney's Office  
900 Jefferson Avenue  
Oxford, MS 38655

For the Defendant: PAUL A. CHINICHE, Esquire  
Chinicke Law Firm, PLLC  
P.O. Box 1202  
Oxford, MS 38655-1202

Court Reporter: PHYLLIS K. McLARTY, RMR, FCRR, CCR #1235  
Federal Official Court Reporter  
911 Jackson Avenue East  
Oxford, MS 38655

1 || (3:20 P.M.)

2 THE COURT: You may call the case.

3                   **COURTROOM DEPUTY:** The Court calls Case Number  
4                   3:21CR107, United States of America versus Gilbert McThunel,  
5                   II. This is a sentencing hearing.

6 THE COURT: Thank you.

7 So, Mr. McThunel, you were previously found guilty by  
8 a jury as to Counts 1 and 2 of the indictment. And do you  
9 understand that you're here today for sentencing?

10 | THE DEFENDANT: Yes, ma'am.

11                   **THE COURT:** And if -- Counselor, yes, if you would  
12 stand. And, Mr. McThunel, if you would stand for me, please.

13 || (DEFENDANT AND HIS COUNSEL COMPLY.)

14                   **THE COURT:** So, in your case, I have received a  
15 sentencing memorandum prepared by your attorney that I have  
16 reviewed. I have received a victim statement from Mr. Cobbs  
17 and -- I hope I haven't overlooked them. I don't recall seeing  
18 any reference letters. Were there?

19                   **MR. CHINICHE:** Yes, Your Honor. There are four. They  
20 were attached to the sentencing memorandum.

21 | THE COURT: Oh, that's right. Thank you.

22 MR. CHINICHE: Yes, Your Honor.

23                   **THE COURT:** Yes, they are attached. So the reference  
24 letters that I read are actually attached to the sentencing  
25 memorandum.

1                   So, Mr. McThunel, what I want to do is give you an  
2 opportunity to speak.

3                   I'll ask you, Mr. Chiniche, do you intend to call any  
4 witnesses prior to sentencing?

5                   **MR. CHINICHE:** No, Your Honor.

6                   **THE COURT:** So, Mr. McThunel, I'll start with you and  
7 allow you to speak to the Court at this time, anything you  
8 would like for me to know or to consider prior to sentencing  
9 you. I'll call upon Mr. Mims and then, lastly, give  
10 Mr. Chiniche an opportunity to speak on your behalf.

11                  **THE DEFENDANT:** I just want to thank you for your  
12 time, Your Honor.

13                  **THE COURT:** Thank you.

14                  Mr. Mims.

15                  **MR. MIMS:** Your Honor, just very briefly.

16                  You made the comment during one of the earlier  
17 sentencings in this matter that you thought that -- something  
18 to the effect that you thought none of the defendants should  
19 get the upper end of the guidelines as to sentence. And I want  
20 to make an argument as to why you should at least consider that  
21 for Mr. McThunel.

22                  In this case, as you know, we have the robbery of  
23 Mr. Sylvester Cobbs, a postal contract carrier, a 65-year-old  
24 gentleman. And all of the evidence points to the fact that  
25 Mr. McThunel is the actual assailant, the one who took the gun,

1 beat Mr. Cobbs, threatened to shoot him, threatened to kill  
2 him, terrorized him, left him physically scarred, left him  
3 mentally scarred.

4 And while I think that Mr. Smith and Mr. Ayodele are  
5 just as guilty and should be held just as accountable, I can  
6 certainly see an argument as to why Mr. McThunel should be held  
7 a little more accountable since he was the one actually with  
8 the firearm that actually -- you know, that Mr. -- Mr. Smith  
9 apparently was a lookout. Mr. Ayodele drove Mr. McThunel to  
10 and from the scene of the robbery, dropped him off and picked  
11 him up. Mr. McThunel is the one that actually physically  
12 assaulted Mr. Cobbs, and, therefore, I certainly could make the  
13 argument as to why he deserves more time than the others  
14 relatively speaking.

15 And so I would remind the Court that we do have, as  
16 the Court is well aware, a victim in this case who didn't  
17 deserve the beating that he got that day and the terrorization  
18 that he got that day, and I would just ask you to hold  
19 Mr. McThunel accountable, as you have with the others, and  
20 sentence him accordingly.

21 Thank you.

22 **THE COURT:** Thank you.

23 Mr. Chiniche.

24 **MR. CHINICHE:** Yes, Your Honor.

25 Academically, my response to Mr. Mims's comment is

1       that Mr. McThunel is subject to sentencing enhancements that  
2       are contained in the presentence report that indicate and  
3       enhances otherwise sentence for what -- the Government believes  
4       that he was the assailant. Mr. Cobbs could not identify  
5       Mr. McThunel. Mr. Cobbs couldn't identify any of the three  
6       defendants. The Government believes it was Mr. McThunel, but I  
7       don't know that that's what the evidence showed.

8                  And for those reasons, I think, academically, you  
9       know, there's a base offense level for this offense, which is  
10      contained in the PSR. There are a number of enhancements that  
11      seem to apply based on the U.S. Sentencing Guidelines, and  
12      those account for Mr. Mims's concern.

13                 I would like to submit that Mr. -- Mr. McThunel has no  
14      prior criminal history. He has -- he has a number of letters  
15      that were written on his behalf indicating that, prior to his  
16      arrest and prior to this incident, he was very helpful to his  
17      sister, who's in the courtroom here today. Mr. McThunel  
18      provided financial support and emotional support to his sister,  
19      and the father of her children didn't do so.

20                 The letters indicate that Mr. McThunel was supportive  
21      to his mother prior to her death. The letters indicate that  
22      Mr. McThunel would visit his father in West Memphis, Arkansas,  
23      up until his -- his being jailed for this -- for this offense  
24      after his conviction.

25                 The PSR does indicate that he began using marijuana at

1       a very early age, at the age of 13, and, in his own words,  
2       smoked marijuana like a freight train. And when he went into  
3       custody, he had a positive test for marijuana, but when he went  
4       on pretrial supervision, he had no offenses. He had no  
5       violations. And he didn't even test positive for marijuana  
6       subsequent to that first test. That is a record, I would  
7       submit, that Mr. McThunel understands what the law is and will  
8       follow the law.

9                   And for those reasons, Your Honor, I would submit that  
10      Mr. McThunel should have a downward variance. He has no  
11      criminal history, and he has been supportive of his family.  
12      For those reasons, Your Honor, we're asking the Court for some  
13      leniency.

14                  Thank you, Your Honor.

15                  **THE COURT:** Mr. Chiniche, I think I failed to ask you  
16      and Mr. Mims both if you had any other objections to the  
17      presentence report other than the one we dealt with in the  
18      hearing.

19                  **MR. CHINICHE:** No, Your Honor. No. There weren't  
20      any -- and the Court sustained the previous objection. I  
21      understand that his adjusted offense level is now a 31 instead  
22      of a 33.

23                  **THE COURT:** Correct.

24                  Any objections by the Government as to any other  
25      matters of the presentence report?

1                   **MR. MIMS:** No, Your Honor.

2                   **THE COURT:** The Court adopts the presentence report  
3 without change.

4                   The Court has previously sustained the objection  
5 regarding restraint and the two-level enhancement.

6                   No count of conviction carries a mandatory minimum  
7 sentence.

8                   The adjusted offense level for Mr. McThunel is 31  
9 versus 33. He has a criminal history category of I, and that  
10 makes his guideline range 108 up to 135 months, with a fine  
11 range of 30,000 up to 300,000.

12                  I remind you, sir, that under Count 1 the maximum  
13 imprisonment is 5 years. Under Count 2, it is a 25-year  
14 imprisonment term.

15                  The sentence is within the guideline range, and the  
16 difference between the maximum and minimum of the guideline  
17 range exceeds 24 months, and the sentence -- specific sentence  
18 is imposed for these reasons.

19                  There is restitution in this case, and that is in the  
20 amount of 61,331.88. That will be broken out between Mr. Cobbs  
21 and the postal service, and I'll explain that to you in a  
22 moment.

23                  In imposing sentence, the Court has considered the  
24 advisory guideline range, the statutory penalties, and the  
25 sentencing factors enumerated in 18 U.S.C., Section 3553(a)(2),

1 which set forth the need for the sentence imposed to reflect  
2 the seriousness of the offense, promote respect for the law,  
3 and provide just punishment; to afford adequate deterrence to  
4 criminal conduct; to protect the public; to provide the  
5 defendant with educational or vocational training, medical  
6 care, or other correctional treatment; to avoid unwarranted  
7 sentencing disparities; and to provide restitution to any  
8 victim.

9                   The Court finds no reason to depart from the sentence  
10 called for by the application of the guidelines inasmuch as the  
11 facts as found are the kind contemplated by the Sentencing  
12 Commission.

13                   Pursuant to the Sentencing Reform Act of 1984, it is  
14 the judgment of the Court, Mr. McThunel, that you be committed  
15 to the custody of the Bureau of Prisons for a term of  
16 121 months. This consists of 60 months on Count 1 and  
17 121 months on Count 2. That is to be served concurrently.

18                   Mr. Mims, I certainly, prior to you bringing it up,  
19 gave consideration to the fact that he is the likely person of  
20 the three that was the assailter of Mr. Cobbs. I thought about  
21 that, and at the same time, in the spirit of the conspiracy, I  
22 think these three persons planned this and each played a role.  
23 And, unfortunately, that might have been your role, but I don't  
24 know that one is any less guilty than the other.

25                   So I tried to take into consideration the victim in

1       this case, that it took all three of them doing their  
2       respective jobs to bring about the harm and the injury to this  
3       victim in this case. So I'm sentencing you with respect to  
4       your conduct as part of the conspiracy without finding you any  
5       greater at fault if you indeed were the person that assaulted  
6       Mr. Cobbs.

7                  The Court is going to place you on supervised release  
8       for a term of 5 years. That consists of 3 years on Count 1 and  
9       5 years on Count 2, and that is to run concurrently. The  
10      defendant must cooperate in the collection of DNA as a  
11      mandatory condition during his supervision.

12                 Mr. McThunel, there were a number of conditions of  
13      standard supervision, 13 or so, in your presentence report.  
14      I'm sure you saw those. Obviously, you won't remember each and  
15      every one of those after extended incarceration; so those will  
16      be reviewed with you by a probation officer upon your release.

17                 There are some special conditions. One is that you  
18      shall provide the probation officer with access to any  
19      requested financial information. And you shall not incur any  
20      new credit charges or open additional lines of credit without  
21      approval of your probation officer. Both of those are there to  
22      ensure the collection of the restitution.

23                 You shall participate in a program of testing and  
24      treatment for substance abuse. The details of that will be  
25      worked out with you, with your probation officer, but you will

1 stay in that program for as long as your probation officer  
2 thinks you need to.

3 You shall not ingest, possess, or otherwise use  
4 marijuana or marijuana products unless that is prescribed to  
5 you by a licensed physician for legitimate medical reason.

6 You are subject to a search condition. And that is  
7 that you shall submit your person, property, house, residence,  
8 paper, vehicles, computers, electronic communications or data  
9 storage devices, or an office to a search by a United States  
10 Probation Officer. This search would only take place at a  
11 reasonable time and in a reasonable manner. You do, however,  
12 need to advise whomever you're living with that you are subject  
13 to this search.

14 As I mentioned earlier, the restitution is \$61,331.88.  
15 \$60,706 of that will go to the postal service; 625.88 will go  
16 to Mr. Cobbs, reimbursement for his medical expenses. You are  
17 to start paying this immediately.

18 If a balance is owed at the time you are released from  
19 prison, your payments will start within 60 days after release.  
20 That will be 10 percent of your gross monthly income but in no  
21 event less than \$100 per month.

22 Now, you're going to owe this restitution jointly and  
23 severally with your other codefendants. So that will be shared  
24 with the other two codefendants.

25 No fine is being imposed due to your inability to pay.

1       However, you do owe a special assessment to the clerk's office  
2       in the amount of \$200. That's \$100 special assessment for each  
3       count on two counts.

4                 Now, at this time, sir, I'm going to advise you of  
5       your right to appeal. You have the right to appeal your  
6       conviction and any sentence imposed illegally or as a result of  
7       a miscalculation of the guidelines or outside the guideline  
8       range or a sentence that you feel is plainly unreasonable.

9                 If you cannot afford to pay the cost for an appeal,  
10      those costs may be waived by the Court. If you cannot afford  
11      to hire counsel, the Court can appoint you counsel for purposes  
12      of appeal.

13                 Do you understand?

14                 **THE DEFENDANT:** Yes, ma'am.

15                 **THE COURT:** Any questions, Mr. Chiniche?

16                 **MR. CHINICHE:** Yes, Your Honor. I have three things.

17                 **THE COURT:** Okay.

18                 **MR. CHINICHE:** First, I would like for the record to  
19      reflect that we are hereby making objection to the  
20      reasonableness of his sentence.

21                 **THE COURT:** Noted.

22                 **MR. CHINICHE:** Secondly, if the Court would recommend  
23      the 500-hour drug program within the BOP. Mr. McThunel may be  
24      able to benefit from that based on the PSR.

25                 **THE COURT:** Okay. Any objection, Mr. Mims?

1                   **MR. MIMS:** No, Your Honor.

2                   **THE COURT:** The Court is going to impose in the  
3 judgment the 500-hour drug program. I don't know, because of  
4 the use of the gun --

5                   **MR. CHINICHE:** Right.

6                   **THE COURT:** -- that that will help you on your  
7 sentence, but it will certainly help you as a person.

8                   **THE DEFENDANT:** Yes, ma'am.

9                   **THE COURT:** Okay.

10                  **MR. CHINICHE:** If he qualifies.

11                  **THE COURT:** If he qualifies, yes. Third thing?

12                  **MR. CHINICHE:** Mr. McThunel suffers from diabetes. He  
13 takes metformin. He has an insulin shot. If there's any way  
14 for the Court to recommend a medical facility that can  
15 accommodate those types of medical, you know, treatments -- I  
16 don't know.

17                  **THE COURT:** Mr. McThunel, I can recommend, but I can't  
18 promise.

19                  **THE DEFENDANT:** Yes, ma'am.

20                  **THE COURT:** So all I can do is state -- and the  
21 presentence report evidences that you have the diabetes issue.  
22 If they see fit, they'll put you at a medical facility, but the  
23 Court has no objection to you being at a medical facility.  
24 Okay?

25                  **THE DEFENDANT:** Yes, ma'am.

1           **MR. CHINICHE:** That's all I have.

2           **THE COURT:** Mr. Mims, anything?

3           **MR. MIMS:** No, Your Honor.

4           **THE COURT:** So at this time I will remand you to the  
5 custody of the marshal service. Thank you.

6           **(CONCLUDED AT 3:35 P.M.)**

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATE

3 I, Phyllis K. McLarty, Federal Official Realtime Court  
4 Reporter, in and for the United States District Court for the  
5 Northern District of Mississippi, do hereby certify that  
6 pursuant to Section 753, Title 28, United States Code, that the  
7 foregoing 13 pages are a true and correct transcript of the  
8 stenographically reported proceedings held in the  
9 above-entitled matter and that the transcript page format is in  
10 conformance with the regulations of the Judicial Conference of  
11 the United States.

12 Witness my hand, this 31st day of August, 2023.

/s/ Phyllis K. McLarty  
PHYLLIS K. McLARTY, RMR, FCRR, CCR #1235  
Federal Official Court Reporter